

HOGAN & HARTSON
LLP.

MICHELE C. FARQUHAR
PARTNER
DIRECT DIAL (202) 637-5663
INTERNET MF7@DC2.HHLAW.COM

CC: 96-45

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

June 23, 1999

RECEIVED

JUL 21 1999

BY HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

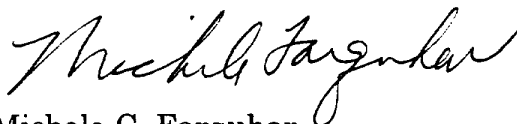
DOCKET FILE COPY ORIGINAL
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Petition for Preemption of an Order of the
South Dakota Public Utilities Commission

Dear Ms. Salas:

On behalf of Western Wireless Corporation, enclosed please find an original and four (4) copies of a Petition for Preemption of an Order of the South Dakota Public Utilities Commission. If there are any questions regarding this matter, please contact the undersigned directly.

Sincerely,



Michele C. Farquhar
Counsel for Western Wireless Corporation

cc: Western Wireless Corporation
Service List

No. of Copies rec'd 041
List ABCDE

In the Matter of)
)
WESTERN WIRELESS)
CORPORATION)
)
Petition for Preemption Of)
An Order Of The South Dakota)
Public Utilities Commission)

Gene DeJordy
Executive Director of
Regulatory Affairs
WESTERN WIRELESS
CORPORATION
3650 - 131st Ave., S.E., Suite 400
Bellevue, WA 98006
(425) 586-8055

Its Attorneys

Dated: June 23, 1999

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY	2
BACKGROUND	5
ARGUMENT	8
I. THE SDPUC DECISION EFFECTIVELY PRECLUDES NEW ENTRANTS FROM PROVIDING UNIVERSAL SERVICE IN HIGH-COST AREAS, AND MUST BE PREEMPTED UNDER SECTION 253.	10
A. The SDPUC Order Is A Barrier To Entry, Violating Section 253(a).	10
1. A New Entrant Cannot Reasonably Be Expected To Offer Ubiquitous Universal Service Prior To ETC Designation.	10
2. A Carrier's Current Gaps in Coverage Area Do Not Justify Blanket Denial of ETC Status.	17
B. The SDPUC Decision Is Not Competitively Neutral And Does Not Satisfy The "Safe Harbor" Requirements of Section 253(b).	18
II. THE COMMISSION SHOULD PREEMPT THE SDPUC DECISION BECAUSE IT VIOLATES EXPLICIT FCC POLICIES, AND THWARTS AND IMPEDES FEDERAL GOALS.	20
A. The SDPUC Violated The Process That The Commission Established In The <i>Universal Service First Report And Order</i>	20
B. The Price Of A Carrier's Current Service Is Irrelevant For Purposes Of Determining Whether It Meets The Requirements of Section 214(e)(1).	22
CONCLUSION	26

In the Matter of)
)
WESTERN WIRELESS)
CORPORATION)
)
)
Petition for Preemption Of)
An Order Of The South Dakota)
Public Utilities Commission)

Western Wireless Corporation and its wholly-owned subsidiary, GCC License Corporation (collectively, “Western Wireless”), respectfully petition the Commission to preempt the decision of the South Dakota Public Utilities Commission (“SDPUC”) denying Western Wireless’ request for designation as an eligible telecommunications carrier (“ETC”) 1/ under Section 214(e) of the Communications Act of 1934, as amended (the “Act”). 2/

The SDPUC's decision is flatly inconsistent with both the letter and the spirit of the Telecommunications Act of 1996 (the "1996 Act"). The core legal conclusion in the SDPUC decision has the effect of precluding competitive entrants

1/ Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, TC98-146 (released May 19, 1999) (attached as Appendix A and available at <http://www.state.sd.us/state/executive/puc/Tc99orders/Tc98-146.htm>) (“SDPUC Order”).

2/ 47 U.S.C. § 214(e).

from providing universal service in high-cost areas, and thus constitutes a barrier to entry that the Commission must preempt under Section 253 of the Act. 3/

INTRODUCTION AND SUMMARY

Congress adopted the 1996 Act to achieve the twin goals of promoting local competition and advancing universal service. 4/ Western Wireless is among the very few carriers actively working to advance both of these goals. Western Wireless intends to provide universal service, in competition with the incumbent local exchange carriers ("ILECs"), to residential consumers in the high-cost and rural areas it serves. 5/ In support of that objective, Western Wireless has applied for designation as an eligible telecommunications carrier ("ETC") in 13 states, and has participated actively in universal service proceedings before the FCC and state commissions.

3/ 47 U.S.C. § 253.

4/ Telecommunications Act of 1996, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 1 (1996); *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15505, ¶ 3 (1996) ("Local Competition Order"); *Federal-State Joint Board on Universal Service, Federal-State Joint Board On Universal Service*, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776, 8781, 8783, ¶ 4, 17 (1997) ("Universal Service First Report and Order").

5/ Western Wireless is a cellular carrier with operations primarily in rural areas in 17 western states, including licenses to serve virtually the entire state of South Dakota. While there remain certain very small unserved areas in South Dakota, Western Wireless is the licensee for all RSA and MSA markets in South Dakota and is committed to serving all areas where there is a demand for service. The SDPUC application was filed on August 25, 1998, by GCC License Corp., a wholly-owned subsidiary of Western Wireless that operates in South Dakota under the Cellular One brand name.

By denying Western Wireless ETC status, the SDPUC has dealt a serious setback to Western Wireless' efforts to bring the benefits of competition to residential customers in rural South Dakota -- and to the 1996 Act's objectives of promoting exactly this type of competition. The SDPUC decision deprives Western Wireless of the opportunity to apply for *federal* universal service support. Because it is impossible for a new entrant like Western Wireless to compete in high-cost areas without such support, the SDPUC's decision imposes an insurmountable barrier to Western Wireless and other new entrants. The SDPUC decision to deny ETC status to Western Wireless unlawfully departs from the requirements of Section 214(e) of the Act. 6/ It also contradicts the fundamental premise of that provision -- that multiple carriers may receive ETC designation 7/ -- and impedes

6/ 47 U.S.C. § 214(e). Specifically, § 214(e)(2) provides that a state commission must designate a carrier as an ETC if it meets the requirements of § 214(e)(1) -- that it must, "throughout the service area for which designation is requested,

"(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services . . . ; and

"(B) advertise the availability of such services and the charges therefor using media of general distribution." § 214(e)(1). In turn, Section 54.101(a) of the FCC's rules, 47 C.F.R. § 54.101(a), contains a list of the supported services.

7/ Section 214(e) *presumes* that the public interest is served by multiple carriers receiving ETC designation in areas not served by rural telephone companies. See 47 U.S.C. § 214(e)(2) ("Upon request . . . the State commission . . . *shall* . . . in the case of all other [than rural] areas, designate more than one common carrier as an [ETC.]" (emphasis added)). In the service area of a rural company, a state must also conclude that designating an additional ETC is in the public interest. *Id.*

achievement of a *competitively neutral* support mechanism, which is a central principle of the federal universal service system. 8/

The FCC should reject the SDPUC's interpretation of Section 214(e). In particular, the FCC should preempt the SDPUC's legal conclusion that a carrier may not receive designation as an ETC unless it is already offering ubiquitous universal service comparable to that of the ILEC. This conclusion secures the ILECs' monopoly in the universal service market and ensures that no carrier other than an ILEC could ever be designated as an ETC or receive federal universal service support. The result is to ensure that no new entrant would ever be able to compete head-on with the ILECs in rural and high-cost areas. The FCC should preempt this approach, which is a barrier to entry and violates Section 253 of the Act and FCC precedent. Instead, the FCC should make it clear that under Section 214(e) a carrier should receive ETC designation if it shows that it has the *capability* to provide facilities-based universal service to customers in a service area, and that it has made a real *commitment* to extend service to additional customers throughout the area upon request. The FCC also should reject the SDPUC's improper denial of Western Wireless's ETC status based on the SDPUC's imposition of criteria that have no basis in the statute, in violation of FCC rules, such as criteria relating to the pricing of a competitive ETC's offerings.

8/ *Universal Service First Report and Order*, 12 FCC Rcd at ¶¶ 46-55.

BACKGROUND

In its petition to the SDPUC, Western Wireless demonstrated that its existing mobile wireless offering in South Dakota satisfies all the criteria in Section 214(e)(1) of the Act and Section 54.101(a) of the FCC's rules. ^{9/} Western Wireless further demonstrated that it has an existing cellular network infrastructure in all areas in which it sought designation as an ETC, and that it would use this existing network infrastructure to provide universal service to consumers.

Western Wireless explained that it would provide universal service using its existing cellular network, and that it would provide customers with a specially designed type of customer premises equipment ("CPE") referred to as "wireless local loop" ("WLL") CPE. Western Wireless' WLL CPE consists of briefcase-sized transmitter/receivers connected to standard household telephone handsets, fax machines, or other CPE. WLL CPE interacts with the existing cellular infrastructure in exactly the same manner as conventional mobile handsets, except that the WLL CPE allows customers to continue to use their existing home telephone, computer and facsimile devices over Western Wireless' network. In a fixed application, the WLL CPE uses commercial A/C power and can be connected to a high-gain antenna affixed to the home. In a mobile application, the WLL CPE operates using a battery much like a handheld phone and a small antenna attached to the unit.

^{9/} 47 C.F.R. § 54.101(a).

In reviewing the company's petition, the SDPUC concluded, as a legal matter, that Section 214(e) requires that "an ETC must be actually offering or providing the services supported by the federal universal service support mechanisms throughout the service area *before* being designated as an ETC." 10/ Based on this legal conclusion, the SDPUC rejected the company's request for ETC status. The SDPUC concluded that it could designate Western Wireless as an ETC only on the basis of its planned offering using WLL CPE, and it disregarded the information Western Wireless presented regarding its current mobile offering in South Dakota.

The SDPUC rejected Western Wireless' request for ETC designation, finding that Western Wireless was not yet "actually providing a universal offering throughout the state by the use of a fixed wireless system" and that the SDPUC could not evaluate the service quality or whether the service is available statewide. 11/ In particular, the SDPUC adopted a number of factual findings, each of which is closely related to or dependent on the legal conclusion that a carrier must *already* be offering services supported by the federal universal service program ubiquitously throughout the service area *before* it can be designated as an ETC. 12/ First, the SDPUC found that Western Wireless is not yet offering or

10/ SDPUC Order, Conclusions of Law, ¶ 6 (emphasis added).

11/ *Id.*, ¶ 26. The SDPUC did "not reach the issue of whether granting ETC status to [Western Wireless] in areas served by rural telephone companies is in the public interest" *Id.*, ¶ 27.

12/ *Id.*, Conclusions of Law, ¶ 6.

advertising service using the WLL CPE to any customers in South Dakota. 13/ Second, it found that Western Wireless had not made network improvements or constructed extensions to its coverage area necessary to serve customers statewide with the WLL CPE, nor had it actually deployed such WLL CPE. 14/ Finally, the SDPUC found that Western Wireless had not yet determined the rate structures and price levels for its universal service offering, and found that it could not verify Western Wireless' intention to offer service at rates comparable to those charged by ILECs. 15/

While the SDPUC concluded that "it [could not] base its decision on whether to grant ETC status to [Western Wireless] based on [its] current mobile cellular system," 16/ it also noted that even if it could do so it would deny Western Wireless ETC status. 17/ It based this conclusion on two findings: that Western Wireless "does not offer a certain amount of free local usage" as required under 47 C.F.R. § 54.101(a)(2), and that SDPUC found that Western Wireless' mobile cellular network currently has gaps in coverage. 18/

13/ *Id.*, Findings of Fact, ¶¶ 17-18.

14/ *Id.*, Findings of Fact, ¶ 20.

15/ *Id.*, Findings of Fact, ¶¶ 23-24.

16/ *Id.*, Findings of Fact, ¶ 8.

17/ *Id.*, Findings of Fact, ¶ 12.

18/ *Id.*

The SDPUC failed to comply with the statutory criteria for designating ETCs and ignored the FCC's rules and orders governing the designation of ETCs. The SDPUC ignored evidence that Western Wireless currently provides all of the supported services, has an extensive facilities-based network in place capable of serving all consumers within the designated service area, and that the company stated that it would serve all consumers within its designated service area.

ARGUMENT

The SDPUC's legal interpretation of Section 214(e) is fundamentally inconsistent with the 1996 Act and the FCC's implementing policies and rules. Essentially, the SDPUC's approach would require a new entrant to offer ubiquitous universal service comparable to that of the ILEC before it can be designated as an ETC. In effect, this would not only prevent any carrier other than an ILEC from ever being designated as an ETC (thereby preventing new entrants from receiving federal universal support), it would actually preclude a competitive carrier from being a universal service provider. The SDPUC decision belies the whole premise of universal service -- that no carrier can economically offer the full complement of basic telecommunications services in high cost areas without support. To force a prospective new entrant to offer a package of services comparable to that of the ILEC *before* it receives ETC status (and thereby becomes eligible for universal service support) is tantamount to forbidding competitive entry and depriving consumers in rural and high-cost areas of the benefits of competition.

Western Wireless requests that the Commission preempt the SDPUC's interpretation of Section 214(e), either under Section 253 of the Act or under traditional preemption jurisprudence. 19/ Section 253 of the Act *requires* the FCC to preempt state rulings that effectively constitute barriers to entry, 20/ such as the SDPUC's flawed interpretation of Section 214(e). Such state rulings cannot survive preemption unless they are competitively neutral, designed to advance universal service, and consistent with Section 254 21/ -- standards that the SDPUC's order fails to meet. Moreover, the SDPUC approach flies in the face of the process anticipated by the FCC -- that a carrier would be "designated as an eligible carrier and *then* must provide the designated services[.]" 22/ The FCC should send the SDPUC and other state commissions a clear message that they must designate a carrier as an ETC if the carrier meets the requirements for ETC designation enumerated in Section 214(e)(1), which means that the carrier must demonstrate that it has the *capability* to provide universal service and it makes the *commitment* to provide universal service once designated.

19/ 47 U.S.C. § 253; *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 n.4 (1986) (FCC preemption is warranted if federal and state jurisdiction are "unseverable," or if a state action would "thwart" or "impede" federal policy).

20/ 47 U.S.C. § 253(d) ("If . . . the Commission determines that a State or local government has permitted or imposed any statute, regulation or legal requirement that violates subsection (a) or (b), *the Commission shall preempt . . . to the extent necessary to correct such violation or inconsistency.*").

21/ 47 U.S.C. § 253(b).

22/ *Universal Service First Report and Order*, 12 FCC Rcd at 8853, ¶ 137 (emphasis in original).

I. THE SDPUC DECISION EFFECTIVELY PRECLUDES NEW ENTRANTS FROM PROVIDING UNIVERSAL SERVICE IN HIGH-COST AREAS, AND MUST BE PREEMPTED UNDER SECTION 253.

A. The SDPUC Order Is A Barrier To Entry, Violating Section 253(a).

Section 253 provides that the Commission “shall preempt” state rulings that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” ^{23/} The prohibition need not be total -- the Commission has held that a statute or regulation that “significantly affects, if not completely eliminates,” the ability of telecommunications service providers other than incumbent LECs to enter a market, will trigger preemption under Section 253(a). ^{24/} As we explain below, the *SDPUC Order* plainly violates Section 253(a) of the Act.

1. A New Entrant Cannot Reasonably Be Expected To Offer Ubiquitous Universal Service Prior To ETC Designation.

In essence, the SDPUC interpreted Section 214(e) as requiring a new entrant to match the universal service offering of the ILEC with respect to features, coverage and price before it can even obtain ETC status, let alone receive federal

^{23/} 47 U.S.C. § 253(a), (d). *See also, e.g., Classic Telephone, Inc.*, 11 FCC Rcd 13082 (1996); *New England Pub. Communications Council*, 11 FCC Rcd 19713 (1996), *recon. denied*, 12 FCC Rcd 5215 (1997); *Pittencrieff Communications, Inc.*, 9 CR (P&F) 1041 (1997); *Silver Star Tel. Co.*, 12 FCC Rcd 15639 (1997); *Public Util. Comm’n of Texas*, 9 CR (P&F) 958 (1997); *California Payphone Ass’n*, 12 FCC Rcd 14191 (1997); *AVR, L.P., d/b/a Hyperion of Tennessee, L.P.*, FCC 99-100, CC Docket No. 98-92 (rel. May 27, 1999).

^{24/} *New England Public Communications Council*, 11 FCC Rcd at 19722, ¶ 20.

high-cost universal service support. 25/ This interpretation of the statute ignores an absolutely critical distinction between ILECs and new entrants -- an ILEC is receiving support for providing universal service while the new entrant is seeking *eligibility* for the support necessary to provide universal service. It is a basic premise of the Act that carriers will not be able to provide universal service at affordable rates in high-cost areas of the country absent federal universal service support. The SDPUC's decision that a carrier must provide a ubiquitous universal service offering *prior* to designation as an ETC requires a new entrant to achieve an objective that Congress already has found impossible to achieve.

Assume, for example, that the cost of serving a high-cost area is \$100. If the ILEC receives a \$75 subsidy, it should be obvious that a new entrant that is not yet able to receive the same \$75 support payment will not be able to sustain a viable business if it tries to offer a competing universal service without the benefit of a subsidy. It should be equally obvious that the new entrant cannot enter the market with a "competitive" offering priced at \$100 if the ILEC is offering service for \$25. Congress simply did not intend ETC designation to be available only to the incumbent carriers, which would have the effect of maintaining a monopoly environment in rural America and depriving consumers there of the benefits of a competitive market.

The SDPUC apparently believes that new entrants to the universal service market are not eligible for ETC designation unless they first act exactly like

25/ See *supra*, notes 10-18 and accompanying text.

the already-subsidized ILECs before receiving a penny of support. This flawed reasoning by the SDPUC effectively precludes new entrants from the universal service market, an outcome the 1996 Act and the FCC's implementing regulations is squarely aimed at preventing. 26/

The SDPUC rejected Western Wireless' ETC designation because Western Wireless is not yet ubiquitously offering the very service that it cannot possibly offer on a broad scale without high-cost universal support -- subsidized, flat-rate service using WLL CPE. The SDPUC also ignored Western Wireless' showing that its current cellular service already includes all of the components of universal service identified by the FCC. But the SDPUC's denial of ETC status *itself* makes it impossible for Western Wireless to provide the service that would enable it to qualify, in the SDPUC's eyes, as an ETC.

There is no reason to think that Congress intended to deny ETC status to a carrier simply because it does not provide the equivalent of the ILEC's universal service offering at the time it seeks designation. Congress certainly understood that without access to support, a new entrant would not be able to enter the market for universal service and compete with the ILEC's subsidized service. 27/ No competitor would ever enter a high-cost market if this were the

26/ It is well-settled that an interpretation of a statute that would lead to an absurd result is insupportable. *See, e.g., KCMC, Inc. v. FCC*, 600 F.2d 546, 549 (5th Cir. 1979) (citing *U. S. v. American Trucking Ass'ns*, 310 U.S. 534 (1940); C. Sands, *Sutherland Statutory Construction* § 46.07 (4th ed. 1972)).

27/ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Seventh Report and Order and Thirteen Order on Reconsideration, FCC 99-119, at ¶ 9 (rel. May 28, 1999) ("*Universal Service Seventh Report and Order*") ("Under the

case. That, in fact, was the situation before adoption of the 1996 Act, and it is what the 1996 Act addressed in allowing competitive carriers to obtain ETC status. New entrants cannot reasonably be expected to begin providing universal service in areas where market forces alone do not encourage competitive entry. Upon designation as an ETC, however, new entrants will be eligible for funding and then, and only then, will be able to enter the universal service market.

The SDPUC's misguided approach appears to be based on a misunderstanding of how a carrier "meets the requirements" of Section 214(e)(1) for purposes of Section 214(e)(2). It is impossible for a new entrant to compete with the subsidized universal service offering of an ILEC *before* the new entrant receives support. Thus, as the FCC has already held:

[A] carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier and *then* must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support. 28/

Section 214(e)(2) must mean that a carrier is entitled to ETC status if:

(1) it has demonstrated the present capability to provide service to consumers within its designated service area, using at least some of its own facilities; and (2) it makes a commitment to serve all consumers within its service area that request

current system of federal support, potential new entrants to the local market in high-cost areas are at a competitive disadvantage relative to incumbents, which have access to much greater implicit support. * * * * Consequently, explicit mechanisms may encourage competitors to expand service beyond urban areas and business centers in all areas of the country . . . as envisioned by the 1996 Act.”).

28/ *Universal Service First Report and Order*, 12 FCC Rcd at 8853 ¶ 137 (1997) (emphasis in original).

service from the carrier. 29/ Considering both a carrier's *present capability* and *commitment* promotes the twin goals of the 1996 Act -- local competition and universal service -- and is more faithful to the language of Section 214(e). 30/

Indeed, this sensible approach is the one taken by the FCC and by the state commissions that have addressed the question to date. For example, the FCC itself has taken precisely this approach in exercising its authority to designate

29/ A carrier that failed to live up to its commitment would lose its ETC status and, accordingly, its ability to draw on federal high-cost support mechanisms.

30/ The FCC has taken a similar approach in a closely analogous situation arising under the 1996 Act, holding that Section 271 cannot reasonably be interpreted to require that new facilities-based competitors have entered markets on a full-fledged basis before the prerequisites for Bell operating company ("BOC") entry into interLATA markets are met. Specifically, so-called "Track A" (§ 271(c)(1)(A)) requires that a BOC is already providing network access and interconnection to providers that offer facilities-based local exchange service to residential and business customers, while "Track B" (*i.e.*, § 271(c)(1)(B)) is available only when "no such provider has requested the access and interconnection described in" Track A. The BOCs argued that they could proceed under Track B even if providers had made requests, as long as the providers did not meet the Track A requirements at the time of the requests. The FCC rejected this approach and held that a BOC would be disqualified from Track B if it received requests that, *if implemented*, would satisfy Track A. The Commission recognized the only sensible interpretation of the reference to Track A in Section 271(c)(1)(B) would be to carriers that *prospectively* would satisfy the Track A criteria *if* the prerequisites for competition were met. *Application by SBC Communications, Inc., et al.*, 12 FCC Rcd 8685 (1997) ("*SBC Oklahoma 271 Order*"), *aff'd sub nom. SBC Communications, Inc. v. FCC*, 138 F.3d 410 (D.C. Cir. 1998). The Commission should apply this common-sense rationale, which recognizes that prospective competitors cannot be expected to have fully entered the local market until the prerequisites for such entry have been satisfied, to Section 214(e) as well.

ETCs under Section 214(e)(6), 31/ granting ETC status to several carriers based on, *inter alia*, the fact that each carrier

offers, or *will be able to offer* all of the services designated for support by the Commission. We therefore conclude that each of the petitioners complies with the requirements of Section 214(e)(1)(A). 32/

Indeed, the FCC's analysis focused on the petitioners' *prospective* compliance with the requirements of Section 214(e)(1). The FCC stated:

We expect that the petitioners *will use* advertising techniques designed to reach all of the residents of their service areas and *will ensure* that customers in their service areas are aware of the availability of supported services. . . . 33/

Similarly, the Maryland Public Service Commission granted ETC status to Bell Atlantic-Maryland based on the company's commitment to commence advertising the availability of its universal service offering, a step the company had apparently not yet taken. 34/ More notably, the Maryland Commission granted ETC status to MCI based on the company's commitment that "it *intends* to offer all of the services supported by the federal mechanisms, using a combination of its own

31/ 47 U.S.C. § 214(e)(6) (authorizing FCC to designate as ETCs common carriers that provide telephone exchange service and exchange access not subject to the jurisdiction of a state commissions).

32/ *Designation of Fort Mojave Telecommunications, Inc., et al., as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, 12 FCC Rcd 22947, ¶ 11 (CCB 1998) (emphasis added).

33/ *Id.*, ¶ 13 (emphasis added).

34/ *Provision of Universal Service to Telecommunications Consumers*, Case No. 8745, Order No. 73802, 88 Md. PSC 239, 1997 WL 1008436, *3 (1997).

facilities and resale of another carrier's service" and its pledge to advertise the availability and prices of the services throughout the service area. 35/ The Maryland Commission observed that, "since MCI's application is based on *commitments* to comply with the eligibility requirements, in contrast to Armstrong's and BA-MD's substantial existing fulfillment of those requirements, the Commission emphasizes that MCI is responsible for fulfilling its eligibility requirements in a timely fashion." 36/ On that basis, the Maryland Commission granted MCI's ETC petition. The SDPUC should have done the same here for Western Wireless. 37/

35/ *Id.* (emphasis added).

36/ *Id.* (emphasis added).

37/ Indeed, several other state commissions have designated as ETCs wireless carriers with service offerings, coverage, rate plans and networks presumably similar to those of Western Wireless. *See, e.g., Yelm Telephone Company, et al*, Docket No. UT-970333 (Washington Utilities and Transportation Commission, effective date Dec. 27, 1997) (designating US Cellular as an ETC); *Eligible Telecommunications Carriers in Arkansas*, Docket No. 97-326-U (Arkansas Public Service Commission, Nov. 7, 1997) (designating Sprint PCS as an ETC); *Designation of Eligible Telecommunications Carriers Under Part 54 of Title 47 of the Code of Federal Regulations*, Docket No. 05-TI-162 (Public Service Commission of Wisconsin, Dec. 23, 1997) (designating Wausau Cellular License Corp. as an ETC); *All Incumbent Local Exchange Carriers, Sprint PCS, and MGC Communications, Inc., to Designate Eligible Communications Carriers Pursuant to the Federal Communications Commission's Report and Order (FCC 97-157) in the Matter of Federal-State Joint Board on Universal Service (CC Docket No. 96-45)*, Resolution T-16105 (Public Utilities Commission of California, Dec. 16, 1997) (designating Sprint PCS as an ETC).

2. A Carrier's Current Gaps in Coverage Area Do Not Justify Blanket Denial of ETC Status.

The SDPUC concluded that Section 214(e) requires a ubiquitous service offering, with no gaps in coverage, as a prerequisite to designation as an ETC anywhere in the service area for which designation is requested. 38/ While Section 214(e)(1) requires ETCs to provide service throughout their service area, it does not require ubiquitous coverage prior to designation as an ETC. Such a requirement would exclude most ILECs, as well as new entrants, from being designated as ETCs. There are many consumers today that do not have access to telephone services because the ILEC does not have facilities in the area. Yet, the ILEC has been designated as an ETC in such areas. As an ETC, the ILEC is required to make service available to all consumers, but in many situations, the ILEC charges a significant up-front non-recurring charge to construct facilities to an unserved area. Western Wireless, or any other new entrant designated as an ETC, similarly would be required to extend its network to serve new customers upon request. To expect a new entrant to have already deployed network facilities to every home in its service area before it can even be declared eligible to receive federal universal service high-cost support simply is not realistic or fair. 39/ As we

38/ *SDPUC Order*, Findings of Fact, ¶¶ 12, 20, 22, 26.

39/ It should be noted that the geographic area covered by Western Wireless' current cellular service is larger than that currently served by ILECs in South Dakota. Western Wireless is in a far better position than the ILECs to extend universal service to unserved or significantly underserved areas, such as Indian reservations.

explain in the preceding section, the only plausible interpretation of Section 214(e) is one that looks not only at present capabilities, but also at a carrier's commitment to serve every home in its designated service area.

Finally, if the SDPUC were serious about meeting its statutory obligations to designate competitive carriers like Western Wireless as ETCs, then even under its flawed reasoning that gaps in coverage area are fatal to designation as an ETC, Western Wireless should have been designated as an ETC in the geographic areas where the evidence demonstrated no gaps in coverage. But denying Western Wireless ETC status in every exchange and study area due to a couple of minor gaps in coverage in a few exchanges, simply cannot be reconciled with the letter or intent of Section 214(e).

B. The SDPUC Decision Is Not Competitively Neutral And Does Not Satisfy The "Safe Harbor" Requirements of Section 253(b).

The SDPUC decision cannot escape preemption under Section 253(b), which preserves states' ability "to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service. . . ." ^{40/} Such state requirements must meet *all* three of these criteria -- they must be "competitively neutral," "consistent with Section 254," and "necessary to preserve and advance universal service" -- to fall within the "safe

^{40/} 47 U.S.C. § 253(b).

harbor” of Section 253(b). Failure to meet even one of the three criteria means that the offending statute, regulation or legal requirement must be preempted. 41/

The SDPUC decision meets none of these criteria. First, the *SDPUC Order*’s conclusion that new entrants cannot be designated as ETCs, unless they already provide services comparable to ILECs’ offerings ubiquitously throughout their service areas, is *not* competitively neutral. Rather, this approach substantially and unreasonably favors incumbent carriers over new entrants such as Western Wireless. Second, the SDPUC’s approach is inconsistent with Sections 254(b)(4) and (d), which require an “equitable and nondiscriminatory” funding mechanism, 42/ because the *SDPUC Order* discriminates in favor of incumbent LECs and harms their competitors. Third, the SDPUC’s restrictive interpretation of the ETC designation process does not “preserve and advance universal service,” but rather retards universal service by improperly withholding from consumers in high-cost areas the opportunity enjoyed by urban customers to take service from a potential competitor.

The *SDPUC Order* is thus an effective barrier to entry in violation of Section 253(a), and does not satisfy the “safe harbor” criteria of Section 253(b). 43/

41/ *Pittencrieff Communications, Inc.*, 9 CR (P&F) at 1051, ¶ 33; accord *Silver Star Tel. Co.*, 12 FCC Rcd at 15655-57, ¶¶ 37, 40.

42/ 47 U.S.C. § 254(b)(4), (d).

43/ A state ruling may also escape preemption under Section 253(f) to the extent the state requires a carrier seeking to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements of Section 214(e). However, this provision has no bearing on the present case, because Section 253(f) does not apply to CMRS services such as those

The Commission must therefore preempt the SDPUC's denial of Western Wireless' request to be designated as an ETC.

II. THE COMMISSION SHOULD PREEMPT THE SDPUC DECISION BECAUSE IT VIOLATES EXPLICIT FCC POLICIES, AND THWARTS AND IMPEDES FEDERAL GOALS.

In addition to preempting the SDPUC decision under its Section 253 authority, the Commission should exercise its preemption power under pre-1996 Act jurisprudence, because the SDPUC decision directly violates governing precedent, 44/ and "thwarts and impedes" the accomplishment of the federal interest in promoting local competition in rural and high-cost areas. 45/

A. The SDPUC Violated The Process That The Commission Established In The *Universal Service First Report And Order*.

The *SDPUC Order's* interpretation of Section 214(e) violates the FCC's direct holding on this point. As noted above, 46/ the SDPUC took the position that a carrier must first offer all the supported services ubiquitously, and *then* receive designation as an ETC. But the FCC has already rejected this notion, and has

offered by Western Wireless. 47 U.S.C. § 253(f)(2). Moreover, the SDPUC specifically declined to reach the issue of whether granting ETC status to Western Wireless in areas served by rural telephone companies is in the public interest. *SDPUC Order*, Findings of Fact, ¶ 27.

44/ See, e.g., *State Corp. Comm'n of Kansas v. FCC*, 787 F.2d 1421 (10th Cir. 1986); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

45/ *Louisiana PSC v. FCC*, *supra* note 17.

46/ See *supra*, notes 10-12, 15 and accompanying text.

definitely specified the process for ETC designation. Specifically, in rejecting an ILEC's argument that additional criteria be imposed beyond those in Section 214(e), the Commission clarified the meaning of the key phrases in the statute:

We conclude that the quoted language indicates only that a carrier is not entitled automatically to receive universal service support once designated as an eligible telecommunications carrier. For example, a carrier must meet the section 214(e) as a condition of its being designated as an eligible carrier and *then* must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support. 47/

In other words, the FCC anticipated that a carrier would be able to satisfy the Section 214(e) conditions and receive ETC designation *without* showing that it already provides service ubiquitously throughout the service area -- but "*then*," subsequently, would have to actually provide the designated services under the terms of Section 214(e) to receive support.

The SDPUC's failure to follow this governing precedent demands preemption. The provisions of Section 214(e) are clearly intended to supersede any state's attempt to deviate from the Act's criteria for designating ETCs for the purpose of federal support, and the SDPUC's failure to properly follow Section 214(e) should be preempted. The Supreme Court has held that the FCC's construction of the provisions of the 1996 Act is binding upon the states, even with respect to provisions that states are responsible for implementing (Section 252 in that case; Section 214(e) here). 48/

47/ *Universal Service First Report and Order*, 12 FCC Rcd at 8853, ¶ 137 (emphasis in original); *see also supra*, note 32 and accompanying text.

48/ *AT&T v. Iowa Utilities Board*, 119 S.Ct. 721, 732-33 (1999).

Moreover, the *SDPUC Order* thwarts and impedes the pro-competitive policy objectives of the federal universal service program, embodied in both the 1996 Act and the FCC's rules and policies. As explained above, the SDPUC's interpretation of Section 214(e) would have the effect of ensuring that no carrier other than an ILEC ever could be designated as an ETC. Section 214(e) clearly contemplates that multiple carriers will be designated as ETCs in non-rural telephone company areas (and even in rural company areas, if the public interest is served). Consistently, the FCC's rules implementing Section 254 establish "competitive neutrality" as a fundamental principle of the federal universal service program. The SDPUC's denial of ETC status to Western Wireless thwarts and impedes this pro-competitive objective.

B. The Price Of A Carrier's Current Service Is Irrelevant For Purposes Of Determining Whether It Meets The Requirements of Section 214(e)(1).

Section 214(e) also clearly precludes the SDPUC's improper consideration of the pricing of Western Wireless' universal service offerings. 49/ One of the SDPUC's key grounds for rejecting Western Wireless' ETC application was that Western Wireless supposedly lacked a definitive financial plan for offering

49/ *Illinois Pub. Telecoms. Ass'n v. FCC*, 117 F.3d 555, 561 (D.C. Cir. 1997) ("the crucial question in any preemption analysis is always whether Congress intended that federal regulation supersede state law") (quoting *Louisiana PSC v. FCC*, 476 U.S. at 369). See also *AT&T v. Iowa Util. Bd.*, 119 S.Ct. 721 (1999) (FCC has authority under Section 201(a) of the Act to issue binding rules even on matters where the 1996 Act directs state commissions to implement policy).

service at comparable prices to ILECs in South Dakota. 50/ The SDPUC appears to have created this pricing-related criterion for evaluating ETC designation requests out of whole cloth. There is absolutely no basis for use of this criterion either in the statute or the FCC's rules. As the Commission held in the *Universal Service First Report and Order*, "[t]he statute does not permit . . . a state commission to supplement the section 214(e)(1) criteria that govern a carrier's eligibility to receive federal universal service support." 51/ Accordingly, the SDPUC's use of a pricing criterion must be preempted by the FCC. 52/

50/ *SDPUC Order*, Findings of Fact, ¶¶ 23-24. The SDPUC's factual finding on this issue appears to be based primarily on statements by Western Wireless that its pricing would be comparable to ILECs in the state, but that it could not determine the actual prices it would offer until it knew the amount of support it would receive. We are somewhat at a loss to understand the SDPUC's confusion over the position taken by Western Wireless. That Western Wireless will provide universal service at prices that are comparable to those of the ILEC reflects the basic principles of a competitive marketplace. There is nothing remotely inconsistent between Western Wireless' statement that its prices will be comparable to ILECs and its statement that the ultimate pricing of its services is dependent on the amount of support available. It should hardly be surprising that Western Wireless might offer service at one price if it received a \$25 subsidy and a different price if it received a \$75 subsidy.

51/ *Universal Service First Report and Order*, 12 FCC Rcd at 8852, ¶ 145; see also *Universal Service Seventh Report and Order*, ¶ 72.

52/ In the proceeding before the SDPUC, U S West took the position that the reference to Section 254 in Section 214(e)(1) gives a state commission license to consider the affordability of a prospective ETC's service offering. But neither Section 214(e)(1) nor the FCC's rules and policies implementing that provision contains any requirement that a new entrant ETC's prices be "comparable" to those of an ILEC. The FCC has always recognized that the "affordability" and "comparability" provisions of Section 254 are intended to provide guidance to the FCC and state commissions on the structure of universal service programs, and that those phrases cannot be used as criteria for designating ETCs. *Universal Service First Report and Order*, 12 FCC Rcd at 8837-46, 8855-59, ¶¶ 108-26, 142-44; *Universal Service Seventh Report and Order*, ¶¶ 29-40. In this regard, it is

Moreover, the SDPUC's insertion of pricing issues into an ETC proceeding, for which pricing is irrelevant, amounts to a state commission's misuse of Section 214(e)(1) to assert entry and rate authority over a CMRS carrier. There is absolutely no lawful basis for such an attempt. Section 214(e)(1) has absolutely no effect on CMRS carriers' exemption from state rate and entry regulation under Section 332(c)(3). To the contrary, the FCC, on a number of occasions, has stated specifically that CMRS carriers are eligible to become ETCs, and need not give up their exemption from rate regulation by state commissions in order to receive ETC status:

We re-emphasize that the limitation on a state's ability to regulate rates and entry by wireless service carriers under [47 U.S.C. § 332(c)(3)] does not allow the states to deny wireless carriers ETC status. 53/

Thus, any review of the pricing of wireless carriers' ETC service offerings supported by universal service funds is inconsistent with the pro-competitive intent of the 1996 Act and the deregulatory intent of the 1993 Omnibus Budget Reconciliation Act, which enacted Section 332(c)(3).

important to keep in mind that a carrier that is designated as an ETC will not receive any universal service support unless it captures high-cost or rural customers for whom support is available. These customers will switch to a new entrant's service only if that service is competitively priced.

53/ *Universal Service Seventh Report and Order* at ¶ 72, citing *Universal Service First Report and Order*, 12 FCC Rcd at 8858-59, ¶ 145 (“[t]he treatment granted to certain wireless carriers under section 332(c)(3)(A) does not allow states to deny wireless carriers eligible status.”).

The SDPUC's dictum that, even if it could consider Western Wireless' mobile cellular service, it would deny ETC status because Western Wireless does not offer a certain amount of free local usage, 54/ is similarly defective. The FCC has not yet established *any* mandatory minimum number of minutes of local usage, 55/ so to conclude that Western Wireless is not offering a certain amount of free local usage imposes a requirement on Western Wireless that does not exist in the FCC rules. 56/ Thus, to conclude that Western Wireless' current offering does not satisfy the local usage requirement, imposed by the SDPUC as an additional criteria on Western Wireless, is contrary to the FCC's rules and policy determinations. 57/

In sum, the SDPUC decision violates the statute and the FCC's rules, and must be preempted on this basis.

54/ SDPUC Order, Findings of Fact, ¶ 12.

55/ The Commission has sought comment on the issue several times, however. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 21252 (1998); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, 12 FCC Rcd. 18514 (1997).

56/ A number of other states have properly granted ETC status to CMRS carriers, *see supra* note 37, without imposing a minimum local usage requirement that has no basis in the FCC's rules.

57/ Moreover, the SDPUC's factual finding in this regard is blatantly incorrect and ignores uncontroverted record evidence. SDPUC Order, Findings of Fact, ¶ 12. The record in the case clearly shows that Western Wireless' mobile cellular service customers have access to varying levels of local usage as part of different service offerings.

CONCLUSION

The SDPUC denied Western Wireless ETC status based on a legal conclusion that carriers must be providing service ubiquitously, with no coverage gaps, at prices and other conditions resembling those of ILECs, before they can be designated as ETCs. The SDPUC's decision denies Western Wireless the opportunity to collect federal universal service support, effectively preventing Western Wireless from competing in high-cost areas of the state. This result is in direct contravention of the principal goals of the 1996 Act -- local competition and universal service. Accordingly, the Commission must exercise its preemption authority, either under Section 253 of the Act or under traditional *Louisiana PSC v. FCC* jurisprudence, and should order the SDPUC to grant Western Wireless' petition for designation as an ETC consistent with the criteria of Section 214(e) and the FCC's rules.

Respectfully submitted,

WESTERN WIRELESS CORP.



Gene DeJordy
Executive Director of
Regulatory Affairs
WESTERN WIRELESS
CORPORATION
3650 - 131st Ave., S.E., Suite 400
Bellevue, WA 98006
(425) 586-8055

Michele C. Farquhar
David L. Sieradzki
Steven F. Morris
Ronnie London
HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Its Attorneys

Dated: June 23, 1999

APPENDIX A

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

**IN THE MATTER OF THE FILING BY GCC
LICENSE CORPORATION FOR DESIGNATION
AS AN ELIGIBLE TELECOMMUNICATIONS
CARRIER**

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW;
NOTICE OF ENTRY OF
ORDER**

TC98-146

On August 25, 1998, the South Dakota Public Utilities Commission (Commission) received a request from GCC License Corporation (GCC) requesting designation as an eligible telecommunications carrier (ETC) for all the exchanges contained within all of the counties in South Dakota.

On August 26, 1998, the Commission electronically transmitted notice of the filing and the intervention deadline of September 11, 1998, to interested individuals and entities. At its September 23, 1998, meeting, the Commission granted intervention to Dakota Telecommunications Group, Inc. (DTG), South Dakota Independent Telephone Coalition (SDITC), and U S WEST Communications, Inc. (U S WEST).

The Commission set the hearing for December 17 and 18, 1998, starting at 9:00 A.M., on December 17, 1998, in Room 412, State Capitol, Pierre, South Dakota. The issue at the hearing was whether GCC should be granted designation as an eligible telecommunications carrier for all the exchanges contained within all of the counties in South Dakota. The hearing was held as scheduled and briefs were filed following the hearing. At its April 26, 1999, meeting, the Commission unanimously voted to deny the application.

Based on the evidence of record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On August 25, 1998, GCC filed an application requesting designation as an ETC for all of the counties within South Dakota. Exhibit 1. GCC's application listed counties it was requesting for ETC status instead of exchanges because it did not know all the exchanges in the state. Tr. at 40. GCC currently provides mobile cellular service in South Dakota. Tr. at 19. GCC uses the trade name of Cellular One. Tr. at 76. GCC is a wholly-owned subsidiary of Western Wireless Corporation (Western Wireless). Tr. at 22.
2. Pursuant to 47 U.S.C. ' 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of section 214(e)(1) as an ETC for a service area designated by the Commission. The Commission may designate more than one ETC if the additional requesting carrier meets the requirements of section 214(e)(1). However, before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. 47 U.S.C. ' 214(e)(2). GCC is requesting designation as an additional ETC throughout the state. Exhibit 3 at 10. South Dakota exchanges are served by both nonrural and rural telephone companies.
3. Pursuant to 47 U.S.C. ' 214(e)(1), a common carrier that is designated as an ETC is

eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution.

4. The Federal Communications Commission (FCC) has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equal; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. ' 54.101(a).

5. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link Up services to qualifying low-income consumers. 47 C.F.R. ' 54.405; 47 C.F.R. ' 54.411.

6. GCC asserts that it currently provides all of the services as designated by the FCC through its existing mobile cellular services. Tr. at 123. Cellular service is generally provisioned as a mobile service. Tr. at 25.

7. Although GCC stated that its existing mobile cellular services currently provide all of the services supported by universal service, GCC intends to offer universal service initially through a fixed wireless offering. Exhibit 4 at 7. GCC specifically stated that it is not seeking universal service funding for the mobile cellular service that it currently provides. Exhibit 3 at 8.

8. GCC states that the Commission can look at the current mobile services it provides to determine whether it meets ETC requirements because GCC would use the same network infrastructure to provision its fixed wireless service. Tr. at 29. The Commission disagrees, and finds that it cannot base its decision on whether to grant ETC status to GCC based on GCC's current mobile cellular service because it is not sufficiently comparable to its proposed fixed wireless system. GCC's own statements support this finding.

9. For example, GCC stated that "[b]ecause GCC's cellular network is designed to serve mobile customers, it would be inappropriate to compare the voice quality using a handheld mobile phone with the voice quality of a fixed wireline service. This is so because GCC's cellular network has been designed to serve mobile customers that may be close to, and in direct line-of-sight of, a transmitter or several miles from, and not in line-of-sight of, a transmitter. To optimize voice quality for its universal service customers, GCC will construct additional antenna towers, as necessary, and will install fixed wireless network equipment (antennas and transmitters) at customer locations, as it did in Nevada where the Company provides universal service to residential and business customers." Exhibit 4 at 12.

10. Further, GCC conceded that there were currently gaps in coverage but stated that the current mobile service is difficult to compare to a fixed wireless service which will have telephones with greater power plus antennas. Tr. at 99.

11. Thus, the Commission finds that since GCC's universal service offering will be initially based on a fixed wireless system the Commission must look at whether the proposed fixed wireless system meets ETC requirements, not whether the existing mobile cellular service provides all of the services supported by universal service.

12. Even if the Commission could base its decision to grant ETC status on GCC's current provisioning of mobile cellular service, the Commission would be compelled to deny GCC ETC status. First, GCC does not offer a certain amount of free local usage. See 47 C.F.R. ' 54.101(a)(2). Under current cellular service the subscriber pays for both incoming and outgoing calls. Tr. at 38. Second, as stated earlier, GCC's mobile cellular service has gaps in coverage that it hoped to fix through the use of a fixed wireless system. Tr. at 99. Therefore, the Commission finds that GCC has failed to show that its current mobile cellular system is able to offer all the services that are supported by federal universal support mechanisms throughout the state.

13. GCC also stated in its prefiled testimony and at the hearing that it intended to deploy personal communications service (PCS) and local multi-point distribution service (LMDS) in South Dakota. Exhibit 4 at 3. GCC initially stated that it holds PCS licenses to serve the entire state of South Dakota. Id. Later it was learned that Western PCS BTA1 License Corporation (Western PCS) owns the radio licenses for PCS in South Dakota. Tr. at 22. Western PCS is an indirect majority-owned subsidiary of Western Wireless. Id. Western PCS has not deployed any PCS systems in South Dakota. Tr. at 27.

14. GCC initially stated that it holds LMDS licenses to serve the entire state of South Dakota. Exhibit 4 at 3. Later it was learned that Eclipse Communications Corporation (Eclipse) owns the radio licenses in South Dakota for LMDS. Tr. at 22. Eclipse is a wholly-owned subsidiary of Western Wireless. Id. In addition, at the hearing, a question was raised as to whether Eclipse had, in fact, received licenses for all of the BTAs in South Dakota. Tr. at 25. Eclipse is in the initial stages of designing and implementing LMDS. Tr. at 27.

15. The Commission finds it is unclear whether GCC intended to offer universal service through PCS or LMDS. However, the Commission finds that if universal service is eventually offered through PCS or LMDS, then Western PCS BTA1 or Eclipse may be the proper companies to apply for ETC status.

16. The Commission finds that it is clear from the record that GCC will initially rely upon a fixed wireless system to offer universal service. Therefore, the Commission shall look at whether the proposed fixed wireless system meets the ETC requirements.

17. GCC does not currently provide fixed wireless loops to any customer in South Dakota. Tr. at 28. GCC has not deployed fixed wireless because there has been no customer demand for the service. Tr. at 101. GCC believed that with a universal service offering, then a customer may want a fixed unit. Id.

18. The Commission finds that since GCC is not actually offering or providing a universal service offering through a fixed wireless system, it must deny GCC's application for ETC status throughout the state. Pursuant to 47 U.S.C. ' 214(e)(2), the Commission may designate an additional requesting carrier as an ETC if it "meets the requirements of paragraph (1)." Paragraph one requires an ETC to offer the supported services throughout the area and advertise the availability of such services. GCC is not offering fixed wireless service nor is it advertising the availability of a fixed wireless service throughout South Dakota. Although GCC argues that there is no requirement that a requesting carrier actually offer the services at the time of its application, the plain language of the statute reads otherwise.

19. Moreover, GCC's application clearly demonstrates the reasons why a requesting carrier must actually be offering the supported services before applying for ETC status. The record shows that since GCC is not currently providing services through fixed wireless, it is impossible to determine whether GCC will meet ETC requirements when it actually begins to provide a universal service offering through a fixed wireless system.

20. First, it is unclear whether all customers in the state would be able to use a fixed wireless system if the Commission had granted ETC status to GCC. GCC has applied for ETC status in 13 states and asserted that it would be able to implement universal service immediately if it were designated an ETC. Tr. at 65. However, GCC's current network infrastructure does not serve the entire state. Tr. at 31, 80-81; Exhibit 9. GCC admitted that it could not provide service to every location in South Dakota. Tr. at 99. GCC would have to make changes and improvements to its network infrastructure in order to improve its voice quality for fixed wireless customers. Exhibit 4 at 12. It would need to construct additional cell sites as well as install high gain antennas and network equipment at customer locations. Exhibit 4 at 7-8; Tr. at 109-110. The antennas would either be a small antenna attached to a fixed unit or a permanent antenna on the roof. Tr. at 92.

21. As an example of a fixed wireless offering, GCC noted the provisioning of fixed wireless service in Reese River Valley and Antelope Valley in Nevada and in North Dakota. Exhibit 4 at 8; Tr. at 100. In both of those cases, GCC had to put in extra cell sites to improve its fixed wireless service. Tr. at 99-100. In Nevada, GCC had to construct another cell site in order to give customers improved service because the original fixed wireless system had problems with blocking. Id.

22. Even if the Commission could grant a company ETC status based on intentions to serve, the Commission finds that GCC has failed to show that its proposed fixed wireless system could be offered to customers throughout South Dakota immediately upon being granted ETC status.

23. Second, GCC has not yet finalized what universal service offering it plans to offer to consumers. Exhibit 4 at 13. This lack of a definite plan creates questions as to its ability to offer universal service based on fixed wireless technology throughout the entire state. For example, GCC first stated that it had not set a rate for its universal service offering because GCC would first need to know what forms of subsidies it would receive. Tr. at 33-34, 89, 114. GCC's position was that it was difficult to know whether GCC would price service at \$15.00 a month when it does not know whether it will have access to the same subsidies that are currently received by the incumbent local exchange companies. Tr. at 89. GCC referenced its offering of fixed wireless service in Reese River Valley and Antelope Valley, Nevada where it provided unlimited local usage for a flat monthly rate and stated that in Nevada the subsidies were known so GCC could provide service at that rate because it knew its costs would be covered. Tr. at 34-35. In addition, GCC would need to construct additional cell sites at an average cost of \$200,000 per site. Tr. at 109, 133. GCC stated that it would pay for any necessary antennas. Tr. at 102. GCC asserted that it would provide customer premise equipment and that all of these expenses would be factored into the cost of providing the service. Tr. at 109, 110. The units that are attached to the houses cost approximately \$300 to \$400 per unit. Tr. at 72. However, at the same hearing, GCC also stated it would provide service at a price comparable to that charged by the incumbent local exchange company. Tr. at 95.

24. The Commission finds that GCC's statements on pricing demonstrate the lack of a clear, financial plan to provision fixed wireless service throughout the state. If GCC needs to know what subsidies it may receive before pricing its service to ensure that its costs will be covered, then the Commission does not understand how it can also say that the price of that service will be comparable with that charged by the incumbent local exchange company. GCC did not show to the Commission that it had a viable financial plan to provide fixed wireless service throughout South Dakota.

25. Moreover, GCC's references to its provisioning of fixed wireless service in Reese River Valley and Antelope Valley, Nevada, only strengthens the Commission's concerns as to the

viability of GCC's being able to offer a fixed wireless service throughout South Dakota. In Reese River Valley and Antelope Valley, Nevada, customers paid \$13.50 for fixed wireless service. Exhibit 10 at 7. However, this service was highly subsidized. Nevada Bell was billed by GCC for cellular charges that exceeded the flat local rate. *Id.* at 13-14. GCC charged Nevada Bell 37 cents a minute during the day and 25 cents a minute at night for each minute that exceeded the flat monthly rate. *Id.* at 14; Tr. at 70. Nevada Bell also paid for summary billing reports which were estimated to cost approximately \$14,000. Exhibit 10 at 13; Tr. at 69. GCC was also authorized to bill Nevada Bell for non-recurring charges. Exhibit 10 at 15.

26. The Commission finds that if GCC were actually providing a universal service offering throughout the state by the use of a fixed wireless system, then the Commission would know whether there were problems with the provisioning of the service, whether GCC was offering all of the supported services, and whether it was able to offer service to customers throughout the state of South Dakota.

27. Since the Commission finds that GCC is not currently offering the necessary services to support the granting of ETC designation, the Commission need not reach the issue of whether granting ETC status to GCC in areas served by rural telephone companies is in the public interest.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31, including 1-26-18, 1-26-19, 49-31-3, 49-31-7, 49-31-7.1, 49-31-11, and 49-31-78, and 47 U.S.C. ' 214(e)(1) through (5).

2. Pursuant to 47 U.S.C. ' 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of section 214(e)(1) as an ETC for a service area designated by the Commission. The Commission may designate more than one ETC if the additional requesting carrier meets the requirements of section 214(e)(1). However, before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. 47 U.S.C. ' 214(e)(2).

3. Pursuant to 47 U.S.C. ' 214(e)(1), a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution.

4. The FCC has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equal; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. ' 54.101(a).

5. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link Up services to qualifying low-income consumers. 47 C.F.R. ' 54.405; 47 C.F.R. ' 54.411.

6. The Commission finds that pursuant to 47 U.S.C. ' 214(e), an ETC must be actually

offering or providing the services supported by the federal universal service support mechanisms throughout the service area before being designated as an ETC. GCC intends to provide a universal service offering initially through a fixed wireless system. However, it does not currently offer fixed wireless service to South Dakota customers. The Commission cannot grant a company ETC status based on intentions to serve.

7. The Commission finds that since it finds that GCC is not currently offering the necessary services to support the granting of ETC designation, it need not reach the issue of whether granting ETC status to GCC in areas served by rural customers is in the public interest.

It is therefore

ORDERED, that GCC's application requesting designation as an ETC for all of the exchanges contained within all of the counties in South Dakota is denied.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 19th day of May, 1999. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 19th day of May, 1999.

CERTIFICATE OF SERVICE

BY ORDER OF THE COMMISSION:

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: _____

Date: _____

(OFFICIAL SEAL)

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

LASKA SCHOENFELDER,
Commissioner